taking of depositions.[7] A liberal attitude has resulted in the granting of the privilege to the non-resident attorney accompanying his client.[8] Comity has resulted in state courts allowing the exemption to apply to parties and witnesses in attendance on federal courts,[9] and one state, at least, has extended it to witnesses passing through the state to attend a sister state's courts.[10]

This principle of exemption from process offered as an inducement for attendance must necessarily contemplate any case where attendance on court is voluntary, and exclude the case where presence in the jurisdiction is compelled. In those jurisdictions, therefore, where witnesses residing in another county in the same state are not subject to compulsion, they are exempt while voluntarily attending court in another county.[11] The California Court, however, early took the contrary position,[12] though such witnesses are exempt from arrest. On the other hand, a person in a criminal proceeding, dragged into the jurisdiction by extradition process, cannot avail himself of a reward intended only for voluntary appearance.[13] The apparent exception of persons extradited from foreign countries, who cannot be proceeded against except for the offence for which extradited, rests solely upon treaty provisions.[14]

The service of civil process upon a privileged person, however, is not void, and the privilege must be asserted at the first opportunity or it is waived.[15] And an act of a privileged person while in the jurisdiction, which itself gives rise to proceedings against him, is regarded as a waiver as to those proceedings.[16]

W. A. S.

PUBLIC SERVICE COMPANIES: SCOPE OF FEDERAL EMPLOYERS' LIABILITY ACT.—The relation of interstate carriers to their em-

---

[7] Burroughs v. Cocke & Willis (Okla., 1916), 156 Pac. 196.

[8] Central Trust Co. v. Milwaukee St. Ry. Co. (1896), 74 Fed. 442; Read v. Neff (1913), 207 Fed. 890. Contra, Greenleaf v. People's Bank (1903), 133 N. C. 292, 45 S. E. 638.

[9] Bunce v. Humphrey (1915), 214 N. Y. 21, 108 N. E. 95; Sofge v. Lowe (1915), 131 Tenn. 626, 176 S. W. 106.

[10] Sofge v. Lowe (1915), supra, n. 9.

[11] Gregg v. Sumner (1886), 21 Ill. App. 110; Reiff v. Tressler (1912), 86 Kan. 273, 120 Pac. 360; Sebring v. Stryker (1894), 10 Misc. Rep. 289, 30 N. Y. Supp. 1053.

[12] Page v. Randall (1855), 6 Cal. 32.

[13] Netograph Mfg. Co. v. Scrugham (1910), 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333. The federal courts take a contrary position wholly because of stare decisis. Feister v. Hulick (1916), 228 Fed. 821.

[14] U. S. v. Rauscher (1886), 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. Rep. 234; In re Reinitz (1889), 39 Fed. 204.

[15] Matthews v. Puffer (1882), 10 Fed. 606; Weston v. Citizens' National Bank (1901), 64 App. Div. 145, 71 N. Y. Supp. 827.

[16] Nichols v. Horton (1882), 14 Fed. 327; Iron Dyke Copper Min. Co. v. Iron Dyke R. Co. (1904), 132 Fed. 208.

ployees, a subject within the field of concurrent commercial jurisdiction, was definitely appropriated to exclusive federal control with the passage of the Federal Employers' Liability Act. By this act it is declared that every common carrier by railroad while engaging in commerce between any of the several states shall be liable to any person suffering injury while he is employed by such carrier in such commerce, if the injury results in whole or in part from the negligence of the carrier or its agents. It is at once obvious that to come within the scope of the act both the carrier and the injured employee must be engaged in interstate commerce, although it is not required that a fellow servant causing the injury be so engaged.[1] Whether such an employee is engaged in interstate commerce is to be determined, not from the general nature of his employment, but from the work in which he is engaged at the particular time at which the injury occurs. In *Minneapolis and St. Louis Railroad Company v. Winters*[2] the question was presented whether one engaged in making repairs in a roundhouse or shop upon an instrumentality used in interstate commerce was at that particular time engaged in interstate commerce so as to claim the protection of the federal act.

When a carrier is engaged in both intrastate and interstate commerce, using the same instrumentalities, appliances and employees in both classes of commerce, it is difficult to draw the line of demarcation between the two classes of employment; but the principle that has been applied, so far as it can be explicitly stated, seems to be that one employed at the time of his injury in the use of, or maintaining in proper condition, any instrumentality or appliance that aids in or is connected with interstate commerce, comes within the statute, although such instrumentality or appliance may also be used in intrastate business.[3] Thus, one engaged in repairing a bridge,[4] a track,[5] a freight shed, in housing interstate freight,[6] or in erecting poles on which are strung the railroad despatch wires,[7] was held to come under the statute. So also, of those engaged in the actual operation of interstate trains,

---

[1] Second Employers' Liability Cases (1911), 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. Rep. 169.

[2] (Feb. 15, 1917), 37 Sup. Ct. Rep. 170.

[3] Eng v. Southern Pacific Co. (1913), 210 Fed. 92.

[4] Pederson v. Del. Lack. & W. R. R. (1912), 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648; Grand Trunk Ry. Co. v. Knapp (1916), 233 Fed. 950.

[5] Zikos v. Oregon R. & Nav. Co. (1910), 179 Fed. 893; Central R. Co. v. Colasurdo (1911), 192 Fed. 901; St. Joseph & G. I. Ry. Co. v. U. S. (1916), 232 Fed. 349.

[6] Supra, n. 3.

[7] Coal & Coke Ry. Co. v. Deal (1916), 231 Fed. 604.

as switchmen,[8] firemen,[9] despatchers,[10], and car sealers.[11] In spite of the intimation to the contrary in the First Employers' Liability Cases,[12] it has been repeatedly held that men engaged in repair shops in repairing instrumentalities used indiscriminately in intrastate and interstate commerce, come within the purview of the act.[13]

The United States Supreme Court, however, in the principal case definitely decides that one engaged in making repairs in a roundhouse or shop upon an instrumentality used in interstate commerce is not subject to the act, for at such time the instrument is definitely withdrawn from all commerce. Running repairs are expressly distinguished, as are repairs of road, track and other permanent structures. This decision, besides having the effect of overruling, among others,[14] many state decisions, including those of California denying the applicability of the state law in such cases,[15] makes necessary a modification of the above test. In so far as employment rests upon the character of the instrumentality, the instrumentality must be appropriated or dedicated to actual service; and, being in service, the character of the instrumentality will be determined by the character of the traffic. Thus, by eliminating all employments preparatory to the commencement of commerce, the decision forces a reduction of all cases to the single principle, whether the instrumentality is in actual service in commerce—bridges, tracks and similar facilities being regarded for this purpose as in actual use.

W. A. S.

STATUTE OF LIMITATION: OPEN BOOK ACCOUNT.—When a merchant sells a bill of goods at a fixed price and charges the amount on his books, must he bring suit in two years as on a

---

[8] Norfolk & Western Ry. v. Earnest (1912), 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. Rep. 654; Pittsburgh etc. R. Co. v. Glinn (1915), 219 Fed. 148. The principal case still leaves doubtful the case of C. B. & Q. R. R. v. Harrington (1915), 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. Rep. 517.

[9] Lamphere v. Oregon R. & Nav. Co. (1912), 196 Fed. 336.

[10] Baltimore & Ohio v. I. C. C. (1910), 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. Rep. 621.

[11] St. Louis, S. F. & Texas R. Co. v. Seale (1912), 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. Rep. 651

[12] First Employers' Liability Cases (1907), 207 U S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141; Zikos v. Oregon R. & Nav. Co., supra, n. 5. Cf. 1 California Law Review 196.

[13] Northern Pac. R. Co. v. Maerkl (1912), 198 Fed. 1; Law v. Illinois Central R. Co. (1913), 208 Fed. 869; Chicago, K. & S. R. Co. v. Kindlesparker (1916), 234 Fed. 1.

[14] Supra, n. 13. The roundhouse or shop housing the instrumentality can no longer be regarded as an instrumentality of interstate commerce, for it took its character from the instrumentality housed. Thomas v. Boston & M. R. R. (1915), 219 Fed. 180.

[15] Southern Pacific Co. v. Pillsbury (1915), 170 Cal. 782, 151 Pac. 277; and modifying San Bernardino v. State Board of Equalization (1916), 172 Cal. 76, 155 Pac. 458, in so far as it covers the question of repairs.